BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

SETH SEMONICK	)	
Claimant	)	
VS.	)	
	)	Docket No. 1,044,572
SERVICE MASTER OF SOUTHEAST KANSAS	)	
Respondent	)	
AND	)	
	)	
TWIN CITY FIRE INS. CO. (THE HARTFORD)	)	
Insurance Carrier	)	

ORDER

Respondent and its insurance carrier (respondent) requested review of the March 18, 2014, Award by Administrative Law Judge (ALJ) Brad E. Avery. The Board heard oral argument on July 8, 2014.

APPEARANCES

William L. Phalen, of Pittsburg, Kansas, appeared for the claimant. Shelley E. Naughtin, of Overland Park, Kansas, appeared for respondent and its insurance carrier.

RECORD AND STIPULATIONS

The Board has considered the record and adopted the stipulations listed in the Award. The record consists of the transcript of the Regular Hearing, dated November 1, 2010, with exhibits attached; the transcript of the Regular Hearing Part II, dated August 29, 2013, with exhibits attached; the Deposition of Edward Prostic, M.D., dated October 21, 2013, with exhibits attached; the Deposition of John B. Moore, IV, dated May 17, 2011, with exhibits attached; the December 21, 2010, IME Report of Lynn Ketchum, M.D.; the April 17, 2012, IME Report of Terrence Pratt; the Deposition of Paul Stein, M.D., dated November 21, 2013, with exhibits attached; the Deposition of Karen Terrill, dated October 10, 2013, with exhibits attached, and the documents of record filed with the Division.

ISSUES

The ALJ found claimant to be permanently and totally disabled due to claimant's bilateral upper extremity injuries and based on the presumption of permanent total disability contained in K.S.A. 44-510c(a)(2).

Respondent appeals, arguing there is no expert evidence to support a finding that claimant is permanently and totally disabled. Respondent further contends claimant does not have a disability to the body as a whole and therefore is not entitled to a work disability. Respondent argues claimant is entitled to no more than a 25 percent functional impairment to the right hand and an 8 percent functional impairment to the left upper extremity.

Claimant argues the ALJ's Award should be affirmed.

Issue on appeal

What is the nature and extent of claimant's impairment and/or disability?

FINDINGS OF FACT

Respondent is a cleaning service that handles janitorial work and also does fire and water restoration and cleanup. Claimant worked for respondent as a fire and water technician for over a year and a half. His job was to tear out houses or businesses and restore them from damage suffered from sewer backups, flooding, torn roofs, basement floods, etc.

On February 16, 2009, claimant suffered injury arising out of and in the course of his employment with respondent. Claimant was moving an 800-pound stainless steel stove from a Sonic that caught fire in Parsons, when the stove fell and caught his gloves, pulling him all the way down to the floor from a standing position. Claimant testified it was a reflex to try and catch the falling stove and, as a result, his fingers were pinned beneath it. His spine also twisted as he went down.

Claimant felt immediate pain and was taken to the emergency room at Mt. Carmel Medical Center where he was treated by surgeon, Dr. Philip Cedeno, who proceeded to re-attach claimant's partially amputated fingers. Claimant was then referred to Dr. Silverberg for a consultation and further treatment. Claimant did not feel comfortable with Dr. Silverberg and asked to see someone else.

Claimant was sent by his attorney to orthopedic surgeon Edward Prostic, M.D., on March 18, 2009, with symptoms in his cervical spine, an ache on the right side of his back, an ache that descended both arms to his hands, some hypersensitivity of his fingers with weakness of grip and an ache about the right knee. Dr. Prostic examined claimant and found he sustained numerous injuries during the course of his employment on

February 16, 2009. The doctor noted claimant's lacerations were healing and that claimant's inability to flex the DIP joints of his long fingers was highly suggestive of a rupture of the flexor digitorum profundus to those fingers. Dr. Prostic felt claimant should undergo exploration of the flexor tendons to pursue repair. He identified this as claimant's most immediate medical problem.

During Dr. Prostic's examination, claimant displayed only mild tenderness posteriorly in the cervical spine. The range of motion was satisfactory with negative root irritability signs and a negative neurologic examination. Claimant's lumbar spine displayed no tenderness, range of motion was satisfactory in all directions and there was no neurologic deficit in either leg. The right knee examination was normal. Dr. Prostic testified that the accident caused claimant's upper extremity injuries in his hands.

Claimant first met with board certified plastic surgeon John B. Moore, IV[1], M.D., on May 15, 2009, with pain in his hands with any type of gripping activity, numbness and tingling in all of the affected fingertips, decreased grip strength and decreased range of motion. Upon examination, Dr. Moore found claimant to have crush injuries to the fingers with crush to digital nerves and flexor tendons. He did not favor any operations on claimant's digital nerves, opining they would continue to improve on their own. An MRI was ordered of the fingers on both hands to see if the tendons were intact. He imposed a lifting restriction of 30 pounds with a two-hand lift. Dr. Moore indicated claimant never presented to him with complaints of pain in his spine or low back.

Dr. Moore performed surgery to repair claimant's right hand on July 23, 2009, but because there was a delay in approving post-surgery physical therapy, the surgery failed. Dr. Moore operated on claimant's right hand again on September 24, 2009, and again claimant was not able to have physical therapy. As a result of surgery and no physical therapy, claimant now has less use of his hands than was optimal. Claimant had a third surgery on his right hand on December 31, 2009. Claimant never had surgery on the left upper extremity, only therapy. Again, physical therapy was denied and eventually Dr. Moore released claimant from his care.

Dr. Moore saw claimant last on May 28, 2010, at which time he found claimant to be at maximum medical improvement. On June 15, 2010, Dr. Moore released claimant to regular duty without restrictions, but the doctor admitted claimant would have limitations because of his grip strength. At this time, grip strength in claimant's left hand was normal with 30 pounds grip strength in claimant's right hand. Dr. Moore assessed claimant a 16 percent whole person impairment (20 percent to the right upper extremity due predominately to strength loss and 7 percent to the left upper extremity due to motion loss). Claimant was released to full duty with no restrictions. Dr. Moore did not feel claimant was in need of any further medical or surgical treatment.

---

[1] Dr. Moore is a plastic surgeon who specializes in hand care.

Claimant met with Dr. Prostic again on June 21, 2010. Claimant had complaints in his hands, the right more than the left. He also continued to have aches in his neck, back, and right knee. Range of motion in the cervical spine was normal with no neurologic deficit noted.

Claimant's greatest concern at this time was with his hands. It continued to be Dr. Prostic's opinion that claimant sustained numerous injuries. He determined claimant had ruptured the flexor digitorum profundus to both long fingers; had a fair result of multiple hand operations and required additional treatment of the hands. Dr. Prostic diagnosed claimant with sprains and strains of the neck, back and right knee with some continuing patellofemoral dysfunction of the right knee. He assigned claimant a 15 percent permanent partial impairment of the right upper extremity; 10 percent permanent partial impairment to the left upper extremity; 7 percent permanent partial impairment to the right lower extremity; and 7 percent impairment to the body as a whole for the cervical spine and lumbar spine combined (2-3 percent for the cervical spine and the remainder for the lumbar spine). The ratings were based on the 4th edition of the AMA *Guides*.

Claimant was sent to Dr. Lynn Ketchum, a hand specialist, for a court-ordered IME on December 21, 2010, to determine what additional treatment claimant would need to cure the effects of the accidental injury. Dr. Ketchum opined claimant's problems were directly related to the February 16, 2009, injury. He recommended therapy and injections. Dr. Ketchum's examination was focused on claimant's upper extremities, in particular, the hands.

On June 14, 2011, Dr. Ketchum provided claimant with injections in both hands to soften scar tissue and decrease discomfort. Claimant was then sent for therapy for range of motion improvement and strengthening three times a week. He experienced partial relief as the result of the therapy.

Claimant was reevaluated by Dr. Prostic on September 23, 2011. Dr. Prostic noted that since the last visit, claimant received steroid injections and physical therapy with Dr. Ketchum. Claimant continued to have bilateral upper extremity symptoms, right greater than left with aches, pains and stiffness. Dr. Prostic opined that unless claimant's symptoms worsen, no additional treatment is necessary. He found no change in the neck, back or right knee. He increased claimant's permanent partial impairment to 20 percent to the right upper extremity, and reaffirmed the 10 percent rating to the left upper extremity, 7 percent to the body as a whole for the cervical spine and lumbar spine combined and 7 percent to the right lower extremity.

Claimant was referred by the ALJ to physiatrist Terrence Pratt, M.D., on April 17, 2012, after requesting treatment for his neck and back. He had complaints to the cervical region of dull aching bilaterally without radicular symptoms, slight numbness intermittently at the posterior right arm and generalized weakness of the extremities without exacerbating or palliative features. In the upper back, claimant had continuous discomfort on the right,

but associated with the cervical symptoms; continuous pain across the low back with dull aching without radicular symptoms; lower extremity numbness or difficulty with bowel or bladder, with symptoms exacerbated with fast turns; bilateral hand pain; and, in the right knee, continuous sensation of sprain with occasional giveway, but with no catching or locking, which was exacerbated with stairs repetitively and while palpated when not weightbearing. Claimant relates his symptoms to his accident on February 16, 2009. A complete pain diagram had claimant's pain level at a 2 to 6 out of 10. He had aching across the low cervical region to the upper thoracic region and left parascapular area and in both forearms and fingers with associated numbness in the fingers. He had aching in the anterior aspect of the right knee. He was able to drive and to perform activities of daily living.

Dr. Pratt's examination included a history of a crush injury to the index, middle, and ring fingers, status post right long finger procedure and repair of the flexor digitorum profundus tendon; cervicothoracic syndrome; low back pain and right knee discomfort. Dr. Pratt opined claimant had symptoms generalized in his spine, but both on prior assessment by Dr. Prostic and during Dr. Pratt's assessment, significant findings of radiculopathy had not been identified. Claimant had mild limitations in active movement with no significant lumbosacral palpable tenderness. He only had palpable tenderness in the cervicothoracic region with point tenderness on the right at the T2 paraspinous muscles. Dr. Pratt recommended a therapeutic program with use of modalities and active exercises with six treatments and progression to a home program for spinal stenosis. He felt claimant would achieve maximum medical improvement at that stage. If the symptoms do not improve, then plain films of the areas would be recommended.

In relationship to his right knee symptoms, significant clinical findings were not identified. In relationship to the distal upper extremity involvement, claimant reported he did not wish to pursue additional procedures. Dr. Pratt determined claimant had completed care in that regard. Dr. Pratt opined claimant should improve with conservative treatment.

Dr. Pratt provided claimant with 12 weeks of work hardening and physical therapy. Claimant had temporary relief from this treatment. Once work hardening and therapy ended, claimant's symptoms in his neck and back returned to their previous level.

Claimant testified that while he was in work hardening and physical therapy for his neck and back, he had continued problems with his right knee. He testified he hurt his knee while using a weight ball in physical therapy. Claimant reported sharp knee pain to his doctor and he was sent for an evaluation with Dr. Bruce. Claimant had an MRI, which showed an abnormality of the proximal tibia. He was not provided with any treatment for his knee. Dr. Bruce released claimant and he was sent back to Dr. Prostic for a final evaluation.

Claimant met with Dr. Prostic on January 8, 2013. Prior to this visit, claimant completed work hardening and physical therapy under the care of Dr. Pratt, and

experienced an acceleration of symptoms in his right knee. An MRI of the right knee showed an abnormality of the proximal tibia consistent with a stress fracture. Claimant was concerned with the right low back pain, with pain shooting about his right knee and into the ankle and an ache in his neck. Both the cervical and lumbar spines again displayed satisfactory alignment and range of motion.

New x-rays of the knee displayed neutral alignment with good maintenance of joint space. New x-rays of the lumbar spine displayed disc space narrowing at L5-S1.

Dr. Prostic opined claimant sustained a stress fracture from work conditioning and work hardening. Suggested treatment for this included spinning on a stationary bicycle without resistence. Dr. Prostic noted claimant's right leg symptoms may include radiculopathy. He opined that, unless claimant's back and leg symptoms worsen, additional investigation and/or treatment are not suggested. He also felt no additional treatment is recommended for the upper extremity lacerations. Claimant's permanent partial impairment continued as at the September 2011, visit. Claimant could return to medium-level employment with minimization of climbing, squatting, kneeling and carrying.

Dr. Prostic had the opportunity to review the task list compiled by Karen Terrill and opined that, out of 47 tasks, claimant could no longer perform 16 for a 34 percent task loss.

At respondent's request, claimant met with board certified neurological surgeon Paul Stein, M.D., on August 13, 2013, for an examination. Claimant presented with multiple complaints. Dr. Stein noted claimant had no prior history of lower back, upper extremity, neck, or right knee symptomatology. Claimant had constant pain in his fingers, greater on the right than the left. Cold weather aggravated his symptoms, and he had limitations in his range of motion of the index fingers. He also had numbness in the three middle fingers, more on the right hand. Claimant also complained of low back pain that sometimes extended into the right buttocks, and of pain in the right knee with occasional buckling. He reported knee pain with weightbearing and movement. Finally he complained of constant stiffness in his neck.

During the physical examination, claimant displayed a full range of motion of the low back and neck. The Spurling test, the equivalent of the straight leg raising in the low back, failed to produce pain in either of claimant's arms. There was no limitation in the range of motion testing of the shoulders, there was no substantial tenderness, guarding, muscle spasm, edema or obvious deformities. Claimant's lower extremities displayed no neurological deficit, with the right knee reflecting no swelling, focal tenderness or crepitus. The range of motion in the knee was normal with no apparent instability and the McMurray test, for meniscus tears, was negative.

When considering Dr. Prostic's findings, Dr. Stein found no significant difference in his examination of the neck and low back. In relation to Dr. Pratt's examination of claimant, Dr. Stein testified there is a history compatible with, not diagnostic of, an injury,

but he couldn't give an opinion as to whether there was a clinical history compatible with an injury and examination findings. He testified he was not impressed by the physical examination findings of Dr. Pratt.

Dr. Stein assessed claimant the following impairments: 27 percent to the right upper extremity at the hand; 4 percent to the left upper extremity at the hand; no impairment of the cervical spine; no impairment of the lumbar spine and no impairment of the right knee. All ratings were based on the 4th edition of the AMA *Guides*. Dr. Stein testified that it is possible to have some impairment but the portion of the anatomy may function perfectly adequately. A rating is proper only if you can document that the pain has an underlying basis and it subsequently impairs the function of the anatomic area.

Dr. Stein indicated that it wasn't a matter of if claimant had sustained injury to his neck or back as a result of the work injury, but whether or not he has any permanent impairment in the neck and back from the work injury. Dr. Stein testified claimant reported quite a bit of pain in his lumbar spine that extended into his right buttock. However, claimant did not have any verifiable signs of radiculopathy. He also had no loss of structural integrity. Claimant had full active range of motion in the neck. Claimant reported his lumbar spine pain was a 2 to 4 out of 10. However, the physical examination of the lumbar spine was unrevealing.

Dr. Stein testified that just because a patient reports having terrible muscle spasm, doesn't mean they have a muscle spasm. He also testified that if someone were to complain of constant neck stiffness, it is not a sign of a neck injury, but simply a complaint of neck stiffness. He went on to state that if someone had continuous low back pain and had documented physical findings of low back pain, those are clinical signs of a lumbar injury. He indicated there must be documented clinical findings to be considered an injury.

Dr. Stein did not measure claimant's range of motion in the lumbar spine as he felt it was normal because claimant was able to flex forward and bring his fingertips all the way to his toes, which was a normal range of motion. Dr. Stein did not record any of claimant's range of motion measurements.

At the regular hearing on August 29, 2013, claimant's complaints were constant pain in his neck, numbness and tingling in both hands, low back and right knee pain. Claimant also complained of pain in his hands. Claimant reported he had dexterity issues, problems picking up things and opening jars and with strength in his hands. He testified that the accident severed six of his fingers that had to be sewn back on, and now some of his fingers curl, two don't bend and others partially bend. He testified he has to tuck his fingers into his palm to keep from hitting them on things and causing him pain. He testified that sometime he cuts himself with his nails from his fingers being tucked into his palm like a fist.

Claimant reported having problems in his neck and back with prolonged sitting and standing, becoming uncomfortable after about an hour. He alternates sitting and standing throughout the day and when this does not relieve his pain he lays down. He is able to sleep six hours before he wakes up with pain and stiffness in his back and hands. He testified his right knee problems prevent him from walking for prolonged periods. He has difficulty going up stairs, kneeling and squatting.

Claimant relates his problems and symptoms to the accident at work for respondent. He has not been able to find work within his physical capabilities. Claimant has not worked anywhere since the day of the accident. After claimant's temporary total disability stopped, he began receiving unemployment for a year.

Karen Terrill prepared a vocational assessment for claimant that identifies 47 tasks claimant has performed over the last 15 years. Since claimant is currently not working he has a 100 percent wage loss.

PRINCIPLES OF LAW AND ANALYSIS

K.S.A. 2008 Supp. 44-501 states in part:

> (a) If in any employment to which the workers compensation act applies, personal injury by accident arising out of and in the course of employment is caused to an employee, the employer shall be liable to pay compensation to the employee in accordance with the provisions of the workers compensation act. In proceedings under the workers compensation act, the burden of proof shall be on the claimant to establish the claimant's right to an award of compensation and to prove the various conditions on which the claimant's right depends. In determining whether the claimant has satisfied this burden of proof, the trier of fact shall consider the whole record.

Claimant suffered a significant injury to his upper extremities, and more particularly, his hands when an 800 pound stove fell and he attempted to catch it. Claimant was provided medical treatment to repair the cuts to his fingers and reattach sections which had been partially amputated. Claimant has also alleged injuries to his neck, low back and right knee resulting from this accident. When claimant was examined by Dr. Prostic, at his attorney's request, he displayed only mild tenderness in the cervical spine with the range of motion being satisfactory. Claimant's lumbar spine displayed no tenderness, the range of motion was satisfactory and there were no neurologic deficits in either leg. The right knee examination was normal. Dr. Prostic anticipated no significant treatment to the spine or right knee.

Dr. Prostic examined claimant on several occasions, never finding anything significant in claimant's cervical spine or lumbar spine. Nevertheless, he still managed to

rate claimant at 7 percent to the whole person for the cervical and lumbar spines combined.

Dr. Pratt noted complaints without significant objective findings in the cervical and lumbar spines. Radicular findings were not identified in the cervical and lumbar spines. The only treatment provided to claimant's cervical and lumbar spines involved physical therapy.

Dr. Stein noted full range of motion in both the low back and neck. There was no substantial tenderness, guarding, muscle spasms, edema or obvious deformities. Dr. Stein found no permanent impairment in either the cervical or lumbar spines as the result of the February 16, 2009 accident.

The Board finds claimant has failed to prove he suffered permanent impairment to either the cervical or lumbar spines resulting from this accident. The Award of the ALJ is reversed on those issues.

The Board does find that claimant suffered permanent functional impairment to his bilateral upper extremities, specifically the hands, and his right knee.

K.S.A. 44-510e Furse 2000 defines functional impairment as:

> . . . the extent, expressed as a percentage, of the loss of a portion of the total physiological capabilities of the human body as established by competent medical evidence and based on the fourth edition of the American Medical Association Guides to the Evaluation of Permanent Impairment, if the impairment is contained therein.

With regard to the right knee, the only rating in this record is that of Dr. Prostic at 7 percent to the lower extremity. That finding is adopted by the Board and the Award in that regard is affirmed.

Claimant's upper extremity impairments are limited to the hand. Three doctors provided ratings in that regard. In averaging the impairment ratings of Dr. Prostic, Dr. Stein and Dr. Moore, the Board finds claimant suffered a 21 percent functional impairment to his right upper extremity at the hand and a 7 percent functional impairment to the left upper extremity at the hand.

K.S.A. 44-510c(a)(2) Furse 2000 states:

> Permanent total disability exists when the employee, on account of the injury, has been rendered completely and permanently incapable of engaging in any type of substantial and gainful employment. Loss of both eyes, both hands, both arms, both feet, or both legs, or any combination thereof, in the absence of proof to the contrary, shall constitute a

> permanent total disability. Substantially total paralysis, or incurable imbecility or insanity, resulting from injury independent of all other causes, shall constitute permanent total disability. In all other cases permanent total disability shall be determined in accordance with the facts.

K.S.A. 44-510c(a)(2) Furse 2000 establishes a rebuttable presumption of permanent total disability in the event of the loss of both hands. However, the presumption can be rebutted with evidence that the claimant is capable of engaging in any type of substantial and gainful employment.[2] Karen Terrill provided a vocational evaluation finding claimant had performed 47 prior tasks over the previous 15 years. Even Dr. Prostic, claimant's expert, found claimant able to perform 16 of the 47 tasks for a 34 percent task loss. Dr. Prostic's restrictions would allow claimant to return to several of the jobs he previously performed. The restrictions of Dr. Moore would allow claimant to return to work. It is significant that no health care provider nor any vocational expert has found this claimant to be permanently and totally disabled from this accident. The Board finds respondent has successfully rebutted the presumption contained in K.S.A. 44-510c(a)(2) Furse 2000. The portion of the Award granting claimant permanent total disability compensation is reversed.

CONCLUSIONS

Having reviewed the entire evidentiary file contained herein, the Board finds the Award of the ALJ should be modified to award claimant a 21 percent functional impairment to the right upper extremity at the level of the hand, a 7 percent functional impairment in the left upper extremity at the level of the hand, and a 7 percent functional impairment to the right lower extremity at the level of the leg. The award of permanent total disability is reversed.

AWARD

WHEREFORE, it is the finding, decision and order of the Board that the Award of Administrative Law Judge Brad E. Avery dated March 18, 2014, is modified to award claimant a 21 percent functional impairment to the right upper extremity at the level of the hand, a 7 percent functional impairment to the left upper extremity at the level of the hand, and a 7 percent functional impairment to the right lower extremity at the level of the leg. An award for a permanent partial general disability and a permanent total disability is denied. In all other regards, the Award of the ALJ is affirmed insofar as it does not contradict the findings and conclusions contained herein.

Claimant is entitled to 66.74 weeks of temporary total disability compensation at the rate of $308.22 per week totaling $20,570.60, all of which appears to have been paid while claimant was being treated for the injuries to his right hand. Thereafter, claimant is entitled

---

[2] *Casco v. Armour Swift-Eckrich*, 283 Kan. 508, 154 P.3d 494, *reh. denied* (May 8, 2007).

to 17.48 weeks of permanent partial functional disability at the rate of $308.22 per week totaling $5,387.69, for a 21 percent functional impairment to the right hand, and 10.50 weeks of permanent partial functional disability compensation at the rate of $308.22 per week, totaling $3,236.31, for a 7 percent functional impairment to the left hand, and 14.00 weeks of permanent partial functional disability compensation at the rate of $308.22 per week, totaling $4,315.08, for a 7 percent functional impairment to the right lower extremity at the level of the leg, for a total award of $33,509.68, all of which is due and owing in one lump sum, minus any amounts previously paid. In all other regards, the Award of the ALJ is affirmed in-so-far as it does not contradict the findings and conclusions contained herein.

IT IS SO ORDERED.

Dated this _____ day of August, 2014.

_____
BOARD MEMBER

_____
BOARD MEMBER

_____
BOARD MEMBER

CONCURRING AND DISSENTING OPINION

The undersigned Board Members concur with the majority's decision to reduce claimant's permanent total disability award. However, claimant should be granted a 67% work disability based on a 34% task loss and a 100% wage loss.

Permanent Total Disability

The totality of the circumstances dictate when a claimant is permanently and totally disabled.[3] No physician indicated claimant was permanently and totally disabled. Dr.

[3] See *Lyons v. IBP, Inc.*, 33 Kan. App. 2d 369, 377-78, 102 P.3d 1169 (2004).

Prostic, claimant's retained expert, opined claimant needed medium work restrictions and still had the ability to perform 31 of 47 pre-injury tasks. No vocational expert indicated claimant was permanently and totally disabled. Claimant has looked for work, represented he was ready, willing and able to work, and did not apply for social security disability.

This matter is similar to *Lawson*,[4] in which the totality of the evidence – largely put on by claimant – demonstrated claimant was not permanently and totally disabled. Lawson had bilateral upper extremity impairment, which triggered the presumption of permanent total disability. However, the presumption was rebutted. Lawson's retained medical expert opined claimant could still perform 18 of 36 pre-injury tasks. No expert, medical or vocational, concluded claimant was permanently and totally disabled. Lawson also testified that she sought employment.

These Board Members disagree with the concept advanced by claimant that respondent must put forth its *own* evidence to rebut the presumption of permanent total disability. K.S.A. 44-510c(a)(2), as written, indicates the presumption is rebutted when the evidence shows a claimant is capable of engaging in any type of substantial and gainful employment. The statute does not say the presumption is rebutted only if respondent puts on its own evidence. The Kansas Court of Appeals made this point clear in *Lawson*:

> . . . Lawson argues without authority that the Hospital had an affirmative duty to rebut the presumption of permanent total disability with expert testimony and that the Board could not rely on other evidence before it – including her own admission that she was actively seeking employment. Lawson's interpretation of K.S.A. 44-510c(a)(2) adds a requirement that does not exist in the test of the statute, and we decline to adopt it.[5]

Additionally, the borrowing of rules from the Code of Civil Procedure, as was done in the judge's Award, such as the application of K.S.A. 60-413 and 60-414, is unnecessary. The Kansas Workers Compensation Act is "substantial, complete and exclusive" and there is no need to resort to other areas of the law.[6] Even if such civil statutes applied, respondent rebutted the presumption of permanent total disability largely based on claimant's own evidence, as argued in respondent's March 13, 2014, email to the judge:

> In response to Bill's objection to the unemployment records, the information contained therein goes to the issue of permanent total disability. Mr. Semonick was ready, willing and able to work for 18 months after he was released from treatment. I would also point out that the issue of permanent total disability was not raised by

---

[4] *Lawson v. Coffeyville Regional Medical Center*, No. 108,671, 2013 WL 5925920 (Kansas Court of Appeals unpublished opinion filed Nov. 1, 2013, *rev. denied* June 20, 2014).

[5] *Lawson* at *5.

[6] See *Johnson v. Brooks Plumbing*, LLC, 281 Kan. 1212, 1214, 135 P.3d 1203 (2006).

> claimant, nor does his vocational or medical evidence support the presumption. On the contrary, Claimant's own evidence supports that he is employable on the open labor market. I, therefore, do not request an extension.

While agreeing with the majority's conclusion claimant is not permanently and totally disabled, these Board Members conclude claimant is entitled to a 67% work disability award.

Work Disability

These Board Members conclude claimant proved minor neck and/or minor back impairment and is entitled to a 67% work disability award.

Undisputedly, claimant's immediate medical treatment focused on his partially severed fingers. However, he regularly voiced back and neck complaints. In claimant's application for hearing filed on February 27, 2009, he alleged, *inter alia*, injury to his neck and back. Just over one month post-injury, claimant complained to Dr. Prostic about his cervical spine, ache on the right side of his back and low back ache. Claimant complained to Dr. Prostic about neck and back aches on June 21, 2010, and no change in such conditions when evaluated again on September 23, 2011. Claimant reiterated his low back and neck complaints when seen by Dr. Prostic on January 8, 2013. Claimant consistently complained about his neck and low back throughout the duration of this matter. Dr. Prostic testified claimant's complaints were very similar over the four year period he examined him.

Dr. Prostic testified claimant qualified for a 5% whole body impairment for his lumbar condition. Despite lack of significant physical findings, Dr. Prostic testified claimant qualified for a 5% whole body impairment for his neck condition. Dr. Prostic apparently used physician judgment and decided to rate claimant as only having a total of 7% impairment to the body as a whole for such conditions (2½% for the neck and 4½% for the low back), which he classified as chronic sprains or strains or as permanent soft tissue injuries. While he acknowledged most strains or sprains resolve without permanent residual impairment, Dr. Prostic noted claimant did not make a full recovery and claimant's mechanism of injury would be competent to cause his permanent back and neck injuries. Common sense tells us that claimant's entire spine and associated musculature would likely be permanently sprained or strained when an 800-pound stove pulled his hands to the ground and pinned him there.

Claimant also complained to Dr. Pratt, the court-ordered physician, about cervical region, upper back and low back complaints. Claimant had mild range of motion deficit and no significant lumbosacral or cervical region tenderness, but he did have palpable tenderness at approximately T2 on the right. T2 would be near the base of claimant's neck. Dr. Pratt diagnosed cervicothoracic syndrome and low back pain. Dr. Pratt suggested physical therapy. A rational inference is Dr. Pratt suggested treatment because claimant had a legitimate injury that was ongoing as of April 17, 2012, *over three years*

from the date of injury. This, while not by itself proving permanent impairment, at least suggests a permanent injury with associated permanent impairment. Following receipt of Dr. Pratt's recommendations, the judge ordered respondent to provide the suggested treatment. Dr. Prostic testified his diagnoses were consistent with Dr. Pratt's diagnoses.

The majority opinion focuses heavily on "objective" proof of "significant" injury. Granted, claimant does not have a clearly identifiable lesion, such as a herniated disk or a fractured vertebrae, and his physical examinations do not point to significant findings. However, the law applicable to this claim, K.S.A. 2008 Supp. 44-508(d), states in part:

> "Personal injury" and "injury" mean any lesion or change in the physical structure of the body, causing damage or harm thereto, so that it gives way under the stress of the worker's usual labor. It is not essential that such lesion or change be of such character as to present external or visible signs of its existence.

The law that went into effect on May 15, 2011, law is markedly different. K.S.A. 2011 Supp. 44-508(f)(1) provides:

> "Personal injury" and "injury" mean any lesion or change in the physical structure of the body, causing damage or harm thereto. Personal injury or injury may occur only by accident, repetitive trauma or occupational disease as those terms are defined.

The new law does not apply to this pre-May 15, 2011, accidental injury. The majority basically requires claimant to prove precisely what K.S.A. 2008 Supp. 44-508(d) does not require – external or visible signs that a lesion exists.

The majority focuses on Dr. Prostic not finding "anything significant."[7] Claimant reported mild cervical spine pain to Dr. Prostic, in addition to claimant having satisfactory range of motion. The majority indicated Dr. Prostic found no tenderness of claimant's lumbar spine, satisfactory range of motion and no neurological deficits in either leg. Moreover, Dr. Prostic noted claimant would likely not need any significant spine treatment.

The majority states Dr. Pratt found no "significant objective findings in the cervical and lumbar spines." The majority observes Dr. Stein found no "substantial" tenderness, guarding, muscle spasms, edema or obvious deformities.

For compensability based on permanent functional impairment, the Kansas Workers Compensation Act in effect at the time of claimant's injury does not require an examining physician to make significant objective findings as a precursor to finding permanent

---

[7] The majority states on page three of the Order that Dr. Prostic found no evidence of injury to claimant's spine. These Board Members are not sure what evidence supports such statement. Dr. Prostic found neck and low back injuries upon which to find claimant had permanent impairment.

impairment. The Act does not require a finding of less than satisfactory spine range of motion. The Act does not require lower extremity neurological concerns, such as radicular numbness, tingling or pain into a leg or legs for a finding of permanent impairment. The Act does not require that a claimant undergo significant treatment to be awarded permanent partial disability benefits. The Act does not require "substantial" tenderness, guarding, muscle spasms, edema or obvious deformities. Additionally, while objective findings are always more likely to prove the existence of impairment, the three pages of the *Guides* that were placed into evidence at Dr. Stein's deposition do not state that "significant," "substantial" and/or "objective" findings are necessary for what the Guides term as "minor" lumbar or cervicothoracic impairment.[8]

As an aside, these Board Members do not agree with the majority's implication that if claimant had injuries other than to his upper extremities, Drs. Moore's and Ketchum's medical records would reflect such additional complaints. Both physicians are upper extremity specialists who do not treat the spine. While claimant never made spine or back complaints to Dr. Moore, such physician testified his treatment only concerned claimant's hands.

The majority's statement that the judge ordered Dr. Ketchum to identify what additional treatment claimant required to cure the effects of the accidental injury is inaccurate. Prior to the judge issuing such order, the case was set for a regular hearing. Claimant testified about his symptoms. The judge decided to continue the regular hearing, pending an IME with Dr. Ketchum, an upper extremity specialist, to ascertain if claimant needed additional treatment. The judge's order specified Dr. Ketchum was to "render an opinion regarding what, if any, additional treatment is necessary to cure and relieve the effects of a 2/16/09 accidental injury *to claimant's upper extremities*" (emphasis added).[9] Dr. Ketchum did not have authority to explore all aspects of claimant's injury.

In fact, the judge ordered claimant seen by a different physician, Dr. Pratt relative to claimant's back and neck complaints. The judge's January 30, 2012, Order for Dr. Pratt's IME specified claimant was complaining about his back.

It is apparent that the judge found claimant to be a credible witness and accepted his complaints as valid. This is no stretch, as having an 800 pound stove pull claimant to the ground from a standing position, causing him to twist his spine, would seem more than competent to cause his entire spine to be wrenched.[10] Claimant's credibility is not in

---

[8] See Stein Depo. Exs. 3-5.

[9] ALJ Order Referring Claimant for Independent Medical Evaluation (November 4, 2010) at 1.

[10] See R.H. Trans. (Nov. 1, 2010) at 10-11. Claimant's counsel asked claimant whether his back struck the ground as a result of the accident. Claimant responded that his back landed on the ground and he was laying on his side, back and legs. These Board Members do not follow how claimant would strike his

question. He has consistently voiced back and neck complaints. Had claimant proved to be an unreliable witness, it would make more sense for the majority to discredit the opinion of Drs. Prostic – that claimant's neck and low back warranted a finding of permanent impairment – as well as the opinion of Dr. Pratt – that claimant's ongoing neck and low back injuries warranted medical treatment.

Given the evidence, these Board Members would conclude claimant proved rather minimal whole body impairment to his neck and/or low back, as concluded by Dr. Prostic, and is thus entitled to a work disability award.

_____
BOARD MEMBER

_____
BOARD MEMBER

c: William L. Phalen, Attorney for Claimant
wlp@wlphalen.com

Shelley E. Naughtin, Attorney for Respondent and its Insurance Carrier
shelly.naughtin@thehartford.com

Brad E. Avery, Administrative Law Judge

back on the ground if his hands were crushed under a stove that fell to the ground. Regardless, the mechanism of injury would seem sufficient to injure claimant's entire spine.